ILLINOIS POLLUTION CONTROL BOARD
October 31, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	#72-151
	)	
HARSHANY, INCORPORATED; PETER HARSHANY AUTO PARTS, HARSHANY SCRAP YARD AND THE ALTON AND SOUTHERN RAILROAD	)	

ROBERT F. KAUCHER, SPECIAL ASST. ATTORNEY GENERAL, ON BEHALF OF ENVIRONMENTAL PROTECTION AGENCY
HARRY J. STERLING OF WALKER AND WILLIAMS, ON BEHALF OF THE ALTON AND SOUTHERN RAILROAD COMPANY
PETER HARSHANY, PRO SE

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.):

Complaint was filed against Harshany, Incorporated; Peter Harshany Auto Parts, Harshany Scrap Yard and the Alton and Southern Railroad Company, alleging that on or about March 10, 1971, June 7, 1971, June 9, 1971, June 18, 1971 and on other unspecified occasions, Respondents allowed the burning of automobiles and conducted a salvage operation by open burning, in violation of Section 9(c) of the Environmental Protection Act (Ill. Rev. Stat. 1971, Chap. 111-1/2, Sec. 109(c) and Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution, and prohibiting open burning, continued in effect by Section 49(c) of the Act, and Rule 502(a), Chapter 2, Part V of the Illinois Pollution Control Board Rules and Regulations Governing Air Pollution, prohibiting open burning.

Respondent Harshany, Incorporated ("Harshany, Inc.") is the owner of a wrecking yard where it engages in the business of salvaging used automobiles. Peter Harshany, his wife and daughter are the sole shareholders in Harshany, Inc. (R. 24). Harshany Auto Parts and Harshany Scrap Yards are not legal entities but only names occasionally ascribed to the operation. During the period covered by the complaint, Respondent Harshany, Inc. owned title to part of the property which constituted its yard and leased the remainder from the Alton and Southern Railroad. The railroad, in addition, owns vacant land adjacent to the yard (R.25 and following). Harshany's operation consists of processing used cars, separating resaleable parts and selling the scrap. (R.27). The car bodies are frequently hauled off of the salvage

yard site to the vacant, contiguous property owned by the railroad, where they are dismantled by persons characterized by Harshany as "contractors". Fires take place in the course of the dismantling operation. This process appears to have been going on for over a 15 or 20 year period (R. 112).

Agency witnesses testified that fires, or evidence of recent fires, were observed on March 10, 1971 (R.50) when tires and upholstery producing smoke and flames were noted,on June 7, 1971 (R. 52-55), when evidence of burned cars was observed with smoke still coming from one car (R.59), on June 18, 1971 (R. 75) when a burning auto was seen and on March 3, 1972 when smoke from the salvage yard was observed without the source being identifiable. The fires observed on March 10, 1971 and March 3, 1972 (R. 87 and R.101) appear to have taken place on property owned by Harshany, Inc. The fires observed on June 9, 1971 and June 18, 1971 appear to have occurred on property owned by the railroad (R.57-75).

Harshany concedes that burning of cars has resulted in the conduct of his business (R. 31, 36, 46, 106). The railroad denies any knowledge of the burning having taken place. We believe that the evidence supports the Agency's contentions. Clearly, Harshany, Inc. is liable because of the negligent and indifferent manner in which it has conducted its business irrespective of whether the persons causing the fires as a consequence of the dismantling operation are contractors or employees of Harshany, Inc. The fires have taken place in pursuance of Harshany, Inc.'s salvage operation with the knowledge and consent of the principals involved. In cases of this sort, we are not obliged to go into the refinements of agency or master and servant relationships. The fires were a result of Harshany's business operation, for which it must be held accountable.

The railroad has filed a Motion to Dismiss contending that it had no awareness of the burning having taken place. This argument might be persuasive if only a single episode was involved. However, where the operation described has been going on over a 15 or 20-year period, where fires have taken place with the frequency described in the hearing, and where the railroad has the capability of control on property owned by it and not leased to others, we equate the position of the railroad to that of an owner who permits promiscuous dumping on its property, see Environmental Protection Agency v. Chicago, Rock Island and Pacific Railroad, #72-136, 5 PCB , (September 12, 1972), and find it liable for permitting open burning on property subject to its control. Furthermore, we do not require that in order to assess liability that the burning must be intentional. Negligence in the conduct of an operation having inherent attributes of burning potential is sufficient to find a violation of the statute and regulations.

Testimony of Peter Harshany and Agency witnesses demonstrated negligence on the part of Respondents which we have held is sufficient to sustain violation of the statutes and regulations. As we stated in Environmental Protection Agency v. J. M. Cooling, #70-2, 1 PCB 85, (December 9, 1970):

> "Because of his negligence in the operation of the dump site, the Respondent caused, allowed and permitted the open burning of refuse in violation of the relevant statutory and regulatory provisions. The Agency's burden of proof has likewise been established in this respect. The law does not require that in order to be found guilty of the open burning provisions, the Respondent must actually be seen igniting the materials burned. Negligence, indifference and slipshod operation of a facility having a high potention of combustion falls within the purview of the statute and regulations. The $1,000 penalty is well within the applicable provisions."

Harshany, Inc. uses, or permits the use of, acetylene torches in its operation, which quite likely were the cause of the fires observed (R.42). As we held in Environmental Protection Agency v. Neal Auto Salvage, Inc., #70-5, 1 PCB 71,(Oct.28,1970)where a $1,000 penalty was assessed for open burning in a salvage operation:

> "The character of the salvage operation, the use of torches for removal of parts, the evident desire to cause burning of upholstery and non-metallic accessories imposes an affirmative obligation on a salvage operator to see that fires do not take place, to take affirmative steps to extinguish them and to be prepared to offer a satisfactory explanation, when, in fact, a fire does occur. The temptations are great to attribute such fire to accident, obtain the economic benefits from it and then assert that the operator is not responsible."

Additionally, there is evidence showing that the operation is not enclosed by a fence adequate to discourage trespassers and that the yard itself was strewn with random piles of auto parts and automobile bodies (R. 55).

Numerous wrecked automobiles and automobiles to be wrecked were on all the properties involved, including that belonging to Harshany, Inc., that leased to Harshany, Inc. and that owned by the Alton and Southern Railroad, and under its exclusive control (R.57). Property owned by Harshany, Inc. or leased to it was under the control of Alton and Southern Railroad. It was the railroad's duty to police this property and it was negligent for not having done so.

We find that Respondents have caused or allowed the open burning of automobiles and the conduct of a salvage operation by open burning, in violation of Section 9(c) of the Environmental Protection Act, Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution and Rule 402(a), Chapter 2, Part V, of the Illinois Pollution Control Board Rules and Regulations Governing Air Pollution. We order all Respondents to cease and desist operation of the salvage yard in violation of the Environmental Protection Act and the relevant regulations. A penalty in the amount of $1,000 is assessed for the violations aforesaid. The continuing indifference of Respondents over a substantial period of time to the legal requirements in the conduct of a salvage operation, and the frequency of fires calls for the imposition of a penalty in excess of that imposed in Environmental Protection Agency v. Farley, #72-267, 5 PCB , (October 31, 1972) decided this day.

In addition to the Motion to Dismiss filed by the railroad based upon its absence of knowledge and control of the burning having taken place on its property which we have denied, the railroad has also filed a Motion to Dismiss based upon alleged constitutional infirmities in the Environmental Protection Act, all of which contentions have been answered by previous opinions of this Board. See Granite City Steel Company v. Environmental Protection Agency, #70-34, 1 PCB 315, (March 17, 1971), Modern Plating Corporation v. Environmental Protection Agency, ##70-38, 71-6, 1 PCB 531, (May 3, 1971). This motion to dismiss is also denied.

Lastly, the railroad has filed a document entitled Cross Complaint in which it seeks a judgment of indemnification against Peter Harshany because of a lease document entered into between him and the railroad. The issues raised by the railroad are not germane to this enforcement action nor properly before the Board. The Environmental Protection Act and the regulations adopted both before and after its passage do not envision this type of litigation or give the Board jurisdiction to adjudicate proceedings of this character. Relief as sought by the Cross Complaint should be pursued in a civil proceeding.

This opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board that:

1. All respondents shall cease and desist the causing or allowing of open burning, and salvage by open burning, on property owned or leased by them in violation of Section 9(c) of the Environmental Protection Act and the Rules and Regulations of the Pollution Control Board.

2. Penalty in the amount of $1,000 is assessed against respondents jointly, for violation of Section 9(c) of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution and Rule 402(a), Chapter 2, Part V of the Illinois Pollution Control Board Rules and Regulations Governing Air Pollution. Payment shall be made within 35 days, by certified check or money order, made payable to the State of Illinois and sent to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion was adopted on the 22nd day of October A. D. 1972, by a vote of 5 to _____.